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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 LARRY GENE HEGGEM,

11 Plaintiff,

12 v.

13 DAVID KENNEY, Medical Manager,
14 Monroe Correctional Complex,

15 Defendant.

Case No. 08-cv-0437-RAJ-JPD

REPORT AND RECOMMENDATION

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17 I. INTRODUCTION AND SUMMARY CONCLUSION

18 Plaintiff Larry Gene Heggem is proceeding *pro se* and *in forma pauperis* in this
19 42 U.S.C. § 1983 civil rights action. He alleges that while he was incarcerated at the Monroe
20 Correctional Complex, Defendant David Kenney was deliberately indifferent to his medical
21 needs in violation of the Eighth Amendment. Dkt. No. 7. Defendant has filed a motion for
22 summary judgment, Dkt. No. 16, to which Plaintiff has not responded. Pursuant to Local Rule
23 CR 7(b)(2), Plaintiff's failure to respond to Defendant's motion for summary judgment
24 amounts to an admission that the motion has merit. For the reasons discussed below, the Court
25 recommends that Defendant's motion for summary judgment, Dkt. No. 16, be GRANTED and
26 that Plaintiff's complaint and this action be DISMISSED with prejudice.

II. FACTS AND PROCEDURAL HISTORY

Plaintiff was a state inmate at the Monroe Correctional Complex (“MCC”) in Monroe, Washington at all times relevant to the instant action.

On February 25, 2008, less than one month prior to Plaintiff filing a proposed complaint in the instant action, Plaintiff filed a § 1983 civil rights action against Sheryl Allbert, a nurse at the MCC and Plaintiff’s primary care provider. *See* Case No. 08-cv-0328, Dkt. No. 1. In his complaint against Allbert, Plaintiff alleged that she was deliberately indifferent to his medical needs in violation of the Eighth Amendment by denying him opiate pain medication. *Id.*

Defendant Allbert moved for summary judgment on September 4, 2008, which this Court granted on December 9, 2008. *See* Case No. 08-cv-0328, Dkt. Nos. 41-42. In its Report and Recommendation, the Court noted that it had reviewed Plaintiff’s medical records submitted in response to Allbert’s motion for summary judgment and found that the records did not establish that Plaintiff should have been given opiate pain medication, that Allbert acted with deliberate indifference toward his medical needs, or that the medical treatment Plaintiff received was medically unacceptable under the circumstances. *See* Case No. 08-cv-0328, Dkt. No. 41.

Plaintiff’s instant complaint now names Dr. David Kenney, the Medical Manager at the MCC, as the defendant instead of Allbert. Plaintiff has also added some claims in addition to the claim that he was denied opiate pain medication; specifically, that he was denied anti-anxiety medication, an MRI scan, special shoes, a hernia repair, and an evaluation for Post-Traumatic Stress Disorder. The time periods at issue in the two lawsuits also partially overlap: the Allbert action covered September 4, 2006 to December 20, 2007, and the Kenney action covers May 18, 2007 to May 15, 2008.

In support of his instant complaint, Plaintiff has submitted a number of his medical records, many of which this Court already considered in Plaintiff’s Allbert action. Plaintiff

1 also submits numerous copies of his handwritten prison complaints and health services kites,
2 most of which relate to his chronic pain and refer to Sheryl Allbert, the defendant in Plaintiff's
3 prior action that has since been dismissed. The limited number of Plaintiff's documents that
4 have any apparent connection to Defendant David Kenney relate to Plaintiff's generalized
5 complaints about the MCC and/or Dr. Kenney not providing Plaintiff adequate medical care or
6 pain medication. Plaintiff has not submitted any documents that demonstrate that Dr. Kenney
7 had any direct role in Plaintiff's medical care at the MCC. Plaintiff has also submitted two
8 letters from Dr. Kenney to Plaintiff, the second of which is dated January 10, 2008 and states:

9 I am happy to respond to any letter that expresses concern about
10 a new topic but, I will no longer answer any letter dealing with
11 pain control or generalized lack of medical care as these topics
12 have been thoroughly researched a multiple previous occasions.
The result of all these investigations showed that you are
receiving medically necessary care.

13 Plaintiff's complaint in the instant action was filed on April 18, 2008. Dkt. No. 4.
14 Plaintiff filed an amended complaint on May 20, 2008. Dkt. No. 7. Defendant Kenney filed a
15 motion to stay proceedings because of the Allbert action on November 6, 2008, Dkt. No. 15,
16 and a motion for summary judgment on January 28, 2009, Dkt. No. 16.

17 III. DISCUSSION

18 A. Federal Rule of Civil Procedure 56(c)

19 Summary judgment "should be rendered if the pleadings, the discovery and disclosure
20 materials on file, and any affidavits show that there is no genuine issue as to any material fact
21 and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "One of
22 the principal purposes of the summary judgment rule is to isolate and dispose of factually
23 unsupported claims or defenses, and [the rule] should be interpreted in a way that allows it to
24 accomplish this purpose." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). "[The
25 rule's] standard provides that the mere existence of *some* alleged factual dispute between the
26 parties will not defeat an otherwise properly supported motion for summary judgment; the

1 requirement is that there be no *genuine* issue of *material* fact.” *Anderson v. Liberty Lobby,*
2 *Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original).

3 The moving party has the burden of demonstrating the absence of a genuine issue of
4 material fact for trial. *See Anderson*, 477 U.S. at 256. “When the moving party has carried its
5 burden under Rule 56(c), its opponent must do more than simply show that there is some
6 metaphysical doubt as to the material facts. . . . Where the record taken as a whole could not
7 lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.”
8 *Scott v. Harris*, 550 U.S. 372, 380 (2007). “Rule 56(e) itself provides that a party opposing a
9 properly supported motion for summary judgment may not rest upon mere allegation or denials
10 of his pleading, but must set forth specific facts showing that there is a genuine issue for trial.”
11 *Anderson*, 477 U.S. at 256. Conclusory allegations in pleadings are not evidence, and cannot
12 by themselves create a genuine issue of material fact. *See Project Release v. Prevost*, 722 F.2d
13 960, 969 (2nd Cir. 1983). Where a party fails to make a showing sufficient to establish the
14 existence of an essential element of his case on which he bears the burden of proof at trial, all
15 other facts are necessarily rendered immaterial and Rule 56(c) mandates the entry of summary
16 judgment. *Celotex*, 477 U.S. at 322-23.

17 B. Plaintiff Has Failed to Demonstrate That Dr. Kenney Violated his Rights.

18 The Eighth Amendment imposes a duty upon prison officials to provide humane
19 conditions of confinement. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). This duty includes
20 ensuring that inmates receive adequate medical care. *Id.* In order to establish an Eighth
21 Amendment violation, a prisoner must satisfy a two-part test containing both an objective and
22 a subjective component. This two-part test requires proof that (1) the alleged wrongdoing was
23 objectively “harmful enough” to establish a constitutional violation; and (2) the prison official
24 acted with a sufficiently culpable state of mind. *Id.* at 834. The first prong, the objective
25 component of an Eighth Amendment claim, is “contextual and responsive to ‘contemporary
26 standards of decency.’” *Hudson v. McMillian*, 503 U.S. 1, 8 (1992) (quoting *Estelle v.*

1 *Gamble*, 429 U.S. 97, 103 (1976)). The second prong, the subjective component of an Eighth
2 Amendment claim, has been defined as “deliberate indifference” to an inmate’s health or
3 safety. *Farmer*, 511 U.S. at 834.

4 Here, Plaintiff has failed to meet either prong of the Eighth Amendment test.
5 Regarding the “objective component,” Plaintiff makes no showing that Defendant’s alleged
6 refusal to provide opiate pain medication, anti-anxiety medication, an MRI scan, special shoes,
7 a hernia repair, and an evaluation for Post-Traumatic Stress Disorder violated contemporary
8 standards of decency. None of Plaintiff’s submitted documents establish that Plaintiff should
9 have been provided such medical treatment during the period in question. Moreover, even if
10 Plaintiff succeeded in showing that a sound medical basis existed for the provision of such
11 treatment, a mere difference of medical opinion is insufficient to establish an Eighth
12 Amendment violation. *See Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996).


13 Regarding the “subjective component,” Plaintiff does not show that there is a triable
14 issue of fact regarding whether Defendant acted with “deliberate indifference” towards his
15 medical needs. Indeed, Plaintiff’s voluminous medical records in this action and the Allbert
16 action demonstrate that the medical staff at the MCC was attentive towards Plaintiff’s medical
17 needs. Moreover, the evidence shows that Dr. Kenney personally responded to Plaintiff’s
18 complaints and directed multiple investigations to ensure that Plaintiff was receiving adequate
19 medical care at the MCC. While Plaintiff may disagree with the course of medical treatment
20 he received, he cannot deny that he received treatment. Plaintiff’s evidence also does not show
21 that the treatment he received was “medically unacceptable under the circumstances.” *Id.* at
22 332. Accordingly, Plaintiff has not satisfied his burden of showing that a genuine issue of
23 material fact exists regarding his Eighth Amendment claim.

24 IV. CONCLUSION

25 For the foregoing reasons, the Court recommends that Defendant’s motion for summary
26 judgment, Dkt. No. 16, be GRANTED and Plaintiff’s complaint and this action be

1 DISMISSED with prejudice. Defendant's motion to stay proceedings, Dkt. No. 15, is
2 DENIED as moot. A proposed Order accompanies this Report and Recommendation.

3 DATED this 28th day of May, 2009.

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5 JAMES P. DONOHUE
6 United States Magistrate Judge
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